No. 18542

In the

United States Court of Appeals

For the Ninth Circuit

THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS, ETC., et al.,
Defendants-Appellants,

vs.

JOHN J. KING, EARL N. ANDERSON, et al.,
Plaintiffs-Appellees.

On Appeal from the United States District Court for the Northern District of California, Southern Division

Appellants' Reply Brief

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After a separation of the wheat from the chaff in appellees' brief, which involves an unravelling of appellees' *ad hominem* assertions interwoven into much of their argument from the substance of the argument itself, appellees' case boils down to a contention that the provisions of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) are applicable to actions of a union and its officers in terminating an employment relationship with the union where the employee is also a union member.

Specifically, the appellees assert (1) that a union may not terminate the employment of an employee of a union who is also a union member except in accordance with the provisions of Section 101(a)(5) of the LMRDA, and (2) that the termination of the employment of a union member

based upon political activity of that member within the union violates the rights conferred upon the member by Sections 101(a)(1), 101(a)(2) and 401 of the LMRDA.

On the other hand, the appellants assert that the LMRDA has no applicability to the relationship between a union and an employee of the union and does not restrict the union in any way either in the creation or the termination of the employment relationship regardless of whether the employee is or is not a union member.

There is thus presented to the Court a clear-cut issue of statutory construction to be determined upon the application of familiar legal principles utilized by courts in construing the intent of statutes. This determination does not, of course, turn on which of the membership rights are involved, as appellees seem to insist, nor does it turn upon any characterization or assessment of whether the union's action was or was not justified. Appellees' position is not aided by arguments ascribing various improprieties to the union just as appellants' position would not be aided by similar contentions concerning appellees. The Court is dealing with a broad principle that has application far beyond the confines of the particular factual setting.

In this connection, however, appellants observe that appellees err when they assert that appellants admit that the employment of the appellees with the union was terminated solely because of their activities in a union election in unsuccessful opposition to the IAM President (Appellees' Br. 5).[1] Counsel for appellants pointed out to the District Court (R. 148) that the complaint was before the Court on a mo-

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1. Appellees also err in their assertion (Appellees' Br. 3-4) that appellants caused spurious union charges to be filed against appellee Skagen and, contrary to prior consistent practice, refused the application of appellee Lindsey for early retirement and refused the application of appellee McGraw for disability retirement. The facts concerning these matters are set forth at page 8 of appellants' brief. The record references there cited make clear the inaccuracies in appellees' statement in their brief concerning these matters.

tion to dismiss and that "fairly analyzed" the complaint alleged such reason for termination. Under the circumstances, counsel felt obligated not to argue otherwise. However, counsel also spoke to the District Court as follows on this point: (R. 122-123)

> "Mr. Hickey: Actually, I should say this in complete fairness to my position: that there was no reason assigned to these men for the termination of their employment by the appointive authority in expressing the
> * * *
>
> "The Court: No, the indication that their terms would not be renewed, whatever it was, didn't say 'because you supported Brown.'
>
> "Mr. Hickey: That's correct, and I wouldn't want to leave the impression with the Court that I honestly feel that this union got rid of these men because of the mere fact that they supported an opposing candidate."

Nor do appellants agree that a termination of appellees' employment with the union for the reasons asserted by appellees constitutes invidious action or involves an assertion of Draconian power over its employees as appellees contend (Appellees' Br. 6), any more than it can properly be said that the administration of any organization at any level, from the Federal government to a small private club, is asserting any such power when it appoints individuals to carry out its policies who are in sympathy with such policies in whom it has confidence and trust. Far from being contrary to democratic principles as appellees contend, it is the very essence of democracy that elected officials of any private or political organization at any level have both the responsibility and the power of their positions and that the burden of the responsibility carries with it, the right to appoint subordinate officials to aid in the discharge of that responsibility who are in full and complete accord with the views of the elected officer.

At the same time, it is clear that whether a court agrees or disagrees with this view is not determinative of the issue here involved. For this reason, appellants do not believe that it would assist the Court in any way in determining the basic issue of statutory construction involved to make a point by point refutation of appellees' claims that appellants' case is founded on an "elaborate smoke screen"; upon "misstatements"; upon "mischaracterization"; upon "sustained camouflage"; upon Orwellian "doublethink" and similar colorful but wholly irrelevant characterizations. Suffice it to say that appellants' brief fully and accurately sets forth the allegations of the complaint and the union action which gave rise thereto (pages 3-7); sets forth verbatim appellees' statement of their basic position before the District Court (pages 12-13); and accurately quotes the basic findings of the District Court. Moreover, it does so without resort to invidious characterizations which appellees seem to believe are a substitute for legal argument.

Appellants now turn to a consideration of familiar principles of statutory construction applicable to the issue before this Court.

A. Recognized Principles of Statutory Construction Support Appellants' Position.

1. The Statutory Language.

Appellees lump together in one argument their contentions concerning the policy, legislative history, and the language of the LMRDA (Appellees' Br. 13-26). Appellees' discussion of the statutory language is confined to pages 15-18. It consists of quoting the various subsections of Section 101(a), Section 401, and Section 609 of the LMRDA; stating that these sections confer certain rights on members; that appellees as members exercised such rights; that the jobs of appellees with appellant union were terminated because they exercised these rights; that, therefore, the

appellants violated the LMRDA; and that the complaint alleging such facts sets forth a good cause of action.

The final step in this syllogism is, of course, the crucial one. It presents the question of whether the statutory language protects the member in the exercise of such rights both with respect to his future status as a union member and his future status as a union employee. Appellees' brief offers little or no help on this question. It does little more than berate appellants' argument and quote from the District Court's finding on what constitutes discipline.

Our position (Appellants' Br. 23-24) is that the statutory language speaks only of membership rights and that its fair import is that it protects the union member in the exercise of these rights against union action which affects his membership status. Conversely, it is our position that the statutory language does not speak of any right of a union member to hold a job with a union and contains no language indicating any statutory intent to protect jobs already held. Appellants cite the two Federal Court decisions which have specifically discussed the statutory language, including the Third Circuit decision in the *Sheridan* case, both of which support appellants' view (Appellants' Br. 23-25). Appellees cite only the District Court decision here under review.

Appellees contend that appellants' argument would write out of the statute membership rights for union employees and officers by, in effect, adding a qualification "except those who are employees or officers" after each reference in the statute to a "member". This they choose to describe as Orwellian "doublethink" (Appellees' Br. 17). Analysis very quickly demonstrates the fallacy inherent in appellees' contention. Appellants' construction clearly leaves every union member, including union employees or officers, free exercise every right guaranteed them by the statute and protects them in the exercise of such rights against any union action affecting their status as members. It simply asserts that if a union member is an employee of a union

or seeks to become an employee, the union's decision in hiring him or retaining him is not restricted by the statutory requirements upon which appellees rely.

Appellees also rely on the District Court finding of an "inextricable link" between a union member's status as a member and his status as an employee in the job of Grand Lodge Representative said to arise from the fact that he must be a member to qualify for such a job. However, union membership does not entitle the member to such a job and the union governing laws (R. 6, 7, 55) impose no restriction upon either the International President's choice of a representative or his replacement of a representative.

The appellees seek to avoid the problem posed for them by the statutory language by contending that they do not seek to vindicate any right to be Grand Lodge Representatives of the International Association of Machinists under the LMRDA nor do they assert that the LMRDA governs their employment relationship with the IAM. They argue that what they are seeking is a vindication of rights held as members and a protection from discipline labled against them because of an exercise of such rights (Appellees' Br. 11). However, the affidavits of the individual appellees (R. 68-87) show that the appellants took no action of any kind to prevent the appellees from engaging in political activity within the union or exercising any of the other rights provided for in the statute. Moreover, it is undisputed that the appellants have not taken any action of any kind against the appellees as members or which affects their membership status in any way. In addition, the complaint seeks a mandatory injunction restoring the appellees to their positions as Grand Lodge Representatives for an indefinite period of time and damages for the termination of this employment. It is therefore submitted that it is clear that appellees do seek to vindicate alleged job rights and clearly contend that the LMRDA protects them with respect to the jobs they held with the IAM.

2. Legislative History of the LMRDA.

Appellees are confronted with the problem that both the Conference Report and the LMRDA, as well as then Senator Kennedy's explanation of that Report to the Senate, clearly stated that the safeguards in Section 101 of the statute against improper discipline were intended to apply only to actions affecting a union member's status as a member (Appellants' Br. 25-29) and the further fact that the District Court's opinion does not reconcile its conclusions with this contrary legislative history (R. 87-96). Appellees seek to avoid this fatal blow to their theory of the statute by several arguments.

First: Appellees suggest that Senator Kennedy's interpretation of the Conference Report exceeds the import of said Report by going beyond mere suspensions (Appellees' Br. 19). However, in each of the cases cited by appellants at pages 27-29 of their brief, the Federal Court involved cited this legislative history for the proposition that provisions of the LMRDA relied upon by appellees do not protect union officers with respect to union action removing them from office.

Second: Appellees argue that the limitation upon the scope of the LMRDA provisions here involved relates only to cases where the officer has misappropriated or dissipated union funds (Appellees' Br. 27). Neither the Conference Report nor the cases cited by appellants, which rely upon such Report, so limit the area of union action with respect to officers or employees.

Third: Appellees argue that the cited legislative history does not support appellants' position because "neither the Conference Committee nor Senator Kennedy state, as they could so easily have done, that the rights elaborated in the LMRDA did not extend to members who were also officers or employees" (Appellees' Br. 19). Such argument demonstrates the same confusion as to appellants' position exhibited by appellees in their prior argument (page 17)

that acceptance of appellants' construction of the statute would read out of the statute the LMRDA protection for a member if he becomes a union employee or officer. As pointed out at page 5 above, we agree that such protection continues for union members with respect to their membership rights when they become union officers or employees. But we do not agree that the statutory protection extends to the officer status or the employment relationship. There was thus no occasion for either the Conference Report or Senator Kennedy to make the statement referred to by appellees. Instead, they made the statement that was appropriate, i.e. that the statutory safeguards were limited to a member's status as a member.

At page 40 of our brief we argue that there was an additional reason for lack of jurisdiction of the District Court over the alleged violation by the appellants of Section 401(e) of the LMRDA. This additional reason is that Section 402 of the statute confers exclusive jurisdiction upon the Secretary of Labor to enforce the provisions of Section 401. *Mamula v. United Steelworkers of America,* 304 F.2d 108 (3rd Cir., 1962).

Appellees devote considerable space in their brief in an effort to refute this argument (Appellees' Br. 23-26). The reason therefor is quite clear. Only in Section 401(e) of the statute is there any reference to "improper interference or reprisal of any kind" for voting or supporting a candidate or candidates in a union election. The reliance of appellees on this Section clearly indicates a lack of confidence on their part upon their arguments concerning Section 101. The basic position of the appellants that the statute is not intended to protect job rights is applicable to Section 401(e) as well as to Section 101. Appellants simply contend that, in addition, any rights that may be conferred by Section 401(e) must be enforced by the Secretary of Labor. In attempting to answer appellants' argument, the appellees for some reason choose to refer to the decision

of the *Mamula* case in the District Court rather than the decision in the Court of Appeals, erroneously stating that the appellants cited the District Court decision. The Third Circuit in the *Mamula* case reviewed the legislative history of Title IV, and particularly of Section 401, at some length and pointed out, among other things, that the provision in the House bill, which would have specifically permitted a member of a labor organization aggrieved by a violation of Section 401 to bring a civil action, was eliminated by the Conference Committee. The Third Circuit also quotes from the statement of then Senator Kennedy in reporting to the Senate on the Conference bill as calling attention to the fact that the House version, which would have substituted suits by individual union members for enforcement by the Secretary of Labor, had been stricken. The Court then spoke as follows on its interpretation that the enforcement of Section 401(c) was committed to the Secretary of Labor: (page 112)

> "Several recent district court decisions that have discussed the interplay between Titles I and IV, and the plaintiff's standing to bring this action are in accord with our conclusion. They are Colpo v. Highway Truck Drivers and Helpers, Local 107, 201 F. Supp. 307 (D. Del. 1961); Gammon v. International Ass'n of Machinists, 199 F. Supp. 433 (N.D. Ga. 1961); Acevedo v. Bookbinders and Machine Operators Local 25, 196 F. Supp. 308 (S.D. N.Y. 1961); Johnson v. San Diego Waiters & Bartenders Union Local 500, 190 F. Supp. 444 (S.D. Calif. 1961); Myers v. International Union of Operating Engineers, 40 CCH Labor Cases ¶ 66,436 (E.D. Mich. 1960); Byrd v. Archer, 38 CCH Labor Cases ¶ 66,083 (S.D. Calif. 1959)."

3. The Judicial Precedents.

Appellees seek to dismiss as inapplicable the cases cited in appellants' brief (pages 29-30) in support of appellants' construction of the statute upon the ground that they are irrelevant. They are irrelevant the appellees say because,

with the exception of the *Sheridan* case, they relate solely to termination for misfeasance in office or other situations where dismissal was ostensibly required by the LMRDA (Appellees' Br. 26). The *Sheridan* decision, they simply seek to disparage.

However, in each of the cases cited by appellants the court involved considered the precise issue here involved, i.e. whether the statutory provisions upon which appellees rely protected a union employee or officer in his employment or officer relations or were limited to actions affecting his membership status. Also, in each case the court held that such statutory provisions protected only a union member's status as a member.

Thus, *Sheridan* states (page 157) that neither the Bill of Rights provisions of the statute nor Section 609 protect status as a business agent. "It is the union-member relationship, not the union-officer or union-employee relationship, that is protected". The *Bennett* decision states (page 362) that the "Act was never intended to cover the relationship of employer and employee. The fact that plaintiff may have been a member of the defendant Union is incidental"; the *Vars* case states (page 243) that "it is clearly established that 29 U.S.C.A. Section 411 was not intended to protect officers from removal from office"; the *Cox* case states (page 449) that "the Act is intended to protect him (i.e. plaintiff) only in his rights as a member of the Union, and not as an officer of the District Council"; the *Mamula* decision states (page 350), that the court "must therefore conclude that the Landrum-Griffin Act deals with the union-member relationship and in no way supports jurisdiction of a suit involving the union-officer relationship"; the *Rinker* decision (page 206) states that "this statute deals with the union-member relationship and in no way supports jurisdiction of a suit involving the employer-employee relationship"; the *Hamilton* case (page 564) states that "the decisions in the cases heretofore decided under section 411(a)

(5) support this interpretation of the section", i.e. defendants' argument that the section applies only to discipline imposed upon members as members; the *Jackson* case (page 480) states that "the action of the Executive Board in removing him from that position (i.e. union Committeeman) does not give him any rights under 29 U.S.C.A. Section 411(a)(5)"; the *Strauss* case states (page 300) that Title I of the statute "deals with the union-member relationship and in no way supports jurisdiction of a suit involving the *employer* (union)-*employee* (business agent) relationship". (Emphasis the court's.)

In short, each of the precedents cited by appellants interpreted the statute contrary to the construction advocated by appellees. The argument of appellees that these holdings on the precise point at issue are irrelevant is like saying that nothing is relevant unless it supports appellees' view of the statute.

In contrast, none of the decisions cited by appellees considered and passed on the issue before this Court.

In *Salzhandler v. Caputo* (Appellees' Br. 27), the Second Circuit set forth the issue before it as follows: (page 446)

> "This appeal raises an important question of the rights of union members under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531: whether a union member's allegedly libelous statements regarding the handling of union funds by union officers justify disciplinary action against the member and his exclusion from any participation in the affairs of the union for five years, including speaking and voting at meetings and even attending meetings. We hold that the LMRDA protects the union member in the exercise of his right to make such charges without reprisal by the union; that any provisions of the union constitution which make such criticism, whether libelous or not, subject to union discipline are unenforceable; and that the Act allows redress for such unlawful treatment."

Nor is there any discussion in the opinion itself of the problem of statutory construction here involved.

The court in *Hamilton v. Guinan,* 199 F. Supp. 562 U.S. D.C. S.D. N.Y., 1961), spoke as follows of the *Salzhandler* case when it was before the District Court: (page 565)

> "The recent cases of Salzhandler v. Caputo, 4 CCH Lab.L.Rep. (43 Lab.Cas.) ¶ 17139 (S.D.N.Y. Aug. 3, 1961), and Rosen v. District Council 9, 198 F. Supp. 46, 4 CCH Lab.L.Rep. (43 Lab.Cas.) ¶ 17074 (S.D. N.Y. June 8, 1961), do not support plaintiff's position. In Salzhandler, the court denied a preliminary injunction on the ground that plaintiff had not shown that there was a reasonable probability that he would ultimately succeed in the action, since he had not exhausted his internal remedies and had not shown that the hearing was unfair. The court did not discuss the issue of jurisdiction under sections 411(a)(5) and 412, but since the discipline was imposed on plaintiff in part for acts taken as a member of the union, jurisdiction apparently would lie under section 412."

Nothing in the Second Circuit decision changes the accuracy of this conclusion.

Likewise, the *Detroy, Gross,* and *Rekant* cases, also cited by appellees (Appellees' Br. 29), did not involve the issue of whether Section 101 of the LMRDA extends to an employment relationship between the union and its employee who is also a union member. In each case, the union was affecting a privilege of membership based on a member-union relationship.

In contrast, in the present case the union acted as an employer toward appellees solely as employees. Any right appellees could have with respect to such action must be based on the law of employer-employee relationship and not the union-member relationship.

It is significant in assessing the applicability of appellees' citations to the issue here involved that Circuit Judge McLaughlin in his dissenting opinion in the *Sheridan* case

(306 F.2d 161-167), upon which appellees rely (Appellees' Br. 31), did not cite or rely upon the *Detroy, Gross,* or *Rekant* decisions, although they had been previously decided. Indeed, at pages 165-166, his opinion discusses the reported decisions and does not mention these cases. Nor is this omission inadvertent. In footnote 2, page 163, the opinion cites and quotes from *Detroy* on the exhaustion of remedy point there involved.

4. The Unreasonable and Discriminatory Results Produced by Appellees' Construction of the Statute.

Appellants argue (Appellants' Br. 40-42) that appellees' construction of the LMRDA produces unreasonable and discriminatory results by (1) encompassing within the coverage of the statute all clerical, custodial, professional or other jobs in which the union serves as employer and the employee happens to be a union member; (2) if literally applied, encompassing such jobs even if the employee was a member of another union; and (3) discriminating against union employees not union members. Appellants suggest that these consequences argue strongly against the construction advanced by appellees.

It is submitted that appellees' answer (Appellees' Br. 35) is in effect no answer. Appellees' suggestion that the union position is unreasonable and discriminatory as regards union employees because it does not extend LMRDA protection to a "union member simply because he is also a union employee" is, like all of appellees' arguments, founded on an erroneous premise. The union position obviously is not that the LMRDA is not applicable to a union member simply because he is also a union employee, but is that the statute does not protect jobs of a union employee, whether he is or is not a union member, because it was not intended to cover union employer-employee relationships.

5. Appellees' Construction of the Statute Would Create a Conflict with the Jurisdiction of the National Labor Relations Board.

Appellants argue in their brief that the construction of the LMRDA advanced by the appellees would create a dual jurisdiction with respect to the job rights of employees of unions generally and that such result militated against construing the LMRDA as appellees do (Appellants' Br. 42-43).[2]

In their brief, appellees argue (page 34) that no conflict can possibly result because NLRB jurisdiction was denied to appellees in the instant case. However, as was pointed out in the appellants' brief (page 40) this argument does not satisfy the situation, since the construction of the LMRDA advocated by the appellees would extend as well to non-supervisory employees of unions and thus give rise to the dual jurisdiction problem.

Appellees' principal argument against the position of the appellants is based upon the decision in the *Smith* case (page 34). However, the decision in the case does not dispose of the problem raised by the appellants. In that case, the Supreme Court held that the authority of the National Labor Relations Board to deal with an unfair labor practice which also violates a collective bargaining contract does not destroy the jurisdiction of the courts in suits under Section 301. In short, where the plaintiff admittedly has two remedies, one an unfair labor practice complaint before the Board and another a suit under Section 301 for breach of contract he does not have to utilize the remedy before the Board. The problem raised by appellants is entirely different. It is the question of whether or not Congress intended

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2. Appellees' statement that the appellants in making this argument are "strongly urging that they themselves were guilty of unfair labor practices" (Appellees' Br. 33-34), constitutes an inaccurate characterization of the appellants' position. Nor does the argument that "appellants are forced to march under the drab banner of administrative procedure" help the Court in its consideration of this problem.

to extend the LMRDA to cover the relationships between a union as an employer and its employees when such relationships are already adequately covered by the National Labor Relations Act. The *Smith* case has no bearing on this problem.

Appellants also pointed out in their brief (page 43) that the acceptance of the appellees' argument in this case has the effect of giving job protection to supervisory employees of unions where Congress, as a matter of policy, has specifically excluded job protection for such class of employees in the National Labor Relations Act and that this fact also militates against the appellees' position. The brief of the appellees does not attempt to answer this contention of appellants.

B. Jurisdiction of the District Court Over Counts 4, 5 and 6 of the Complaint.

The brief of the appellants (pages 44 and 45) argues that the jurisdiction of the District Court over Counts 4, 5 and 6 of the amended complaint, which are based upon a theory of pendent jurisdiction, depends entirely upon this Court's decision with repect to the Federal jurisdiction over Counts 1, 2 and 3. Appellees' brief does not disagree with this position.

C. The District Court's Failure to Dismiss the Complaint Insofar as It Relates to the Period Beyond December 31, 1961, or to Grant Summary Judgment to Appellants Thereon.

Appellants argue in their brief (pages 46-49) that assuming *arguendo* that the District Court was correct in its construction of the statute and its consequent jurisdiction over the subject-matter of the complaint, the Court should have dismissed the complaint insofar as it asserted the claim for relief based on job rights beyond December 31, 1961, or granted the appellants summary judgment with respect to such portion of the complaint. This position was

based upon the contention that the provisions of the IAM Constitution with respect to the jobs held by the appellees in the union as well as their job credentials clearly showed that each appellee held his job as Grand Lodge Representative only for a term expiring on December 31, 1961, and that reappointment was required beyond that date.

In answer to this argument, appellees criticize appellants for their reference to the card held by each appellee as a "credential" and for describing it as an "authorization". Appellees contend that the position of the appellants runs counter to the appellees' affidavits as well as reality and that the cards are simply for identification (Appellee's Br. 36). Appellees' argument simply ignores the fact that the document involved, placed in the record by appellees (R. 35, 36), shows on its face that it is a "credential" and that it "authorizes" the holder to represent the Grand Lodge of the IAM with respect to certain matters (R. 35, 36). The further argument based upon appellees' affidavits is without merit since the cited portions of the affidavits are simply legal conclusions. The undisputed facts before the District Court are the provisions of the IAM Constitution which give the President of the IAM authority to appoint Grand Lodge Representatives for any term that he designates and the job "credential" held by each employee which specifically states that he is "duly authorized" to represent the IAM with respect to certain matters for a period from January 1, 1960, to January 1, 1961. It is submitted that on these undisputed facts the District Court should have granted appellants summary judgment on all claims of the complaint extending beyond December 31, 1961.[3]

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3. Appellees' assertion that the appellants' argument amounts to advocating a "yellow dog" contract since it would require union employees as a condition of employment to forego union membership rights (Appellees' Br. 37) is another in the long list of irrelevant characterizations found in the appellees' brief.

Appellees' brief (pages 38 and 39) also quotes from the decision of the Fifth Circuit in *NLRB v. Hill & Hill Truck Line* in opposition to the appellants on this particular point. In doing so, appellees omit from their quote the following finding of the Fifth Circuit which appeared in the middle thereof: (page 887)

> "Moreover, as far as the record shows, these men were *regular* employees. They were therefore entitled to reinstatement to the jobs they had when they were illegally laid off. Respondent admits it needed them on the work day next following the lay-off."

In addition, the portion of the cited decision that is quoted by appellees is not applicable to the argument advanced by appellants. It could be applicable if appellants were here contending that appellees could not claim damages for the action of the IAM for the period between July 31, 1961, and December 31, 1961. However, appellants make no such contention. It is their position that, upon the undisputed facts of record, the appointment of appellees was for one year only and that it automatically expired on December 31, 1961, in accordance with the terms of the appointment. Thus, this is not a situation as in the *Hill* case where there was a mere contingency which the IAM's action prevented from being resolved and which is now only a subject for speculation. Regardless of the validity of the IAM's action of July 31, 1961, and wholly apart from that action, appellees' term of office expired on December 31, 1961, and they have no claim based on any period beyond that date. Appellants are not urging the Court, as appellees contend, to speculate in their favor but only to determine upon the basis of the IAM Constitution and appellees' credentials of appointment that appellees held a job which automatically terminated on December 31, 1961.

The brief of appellees (page 38) argues that even if the appellants are correct in their construction of the appellees'

appointment, they are not limited in assertion of damages to the period when such appointments expired. They cite in support of this proposition *Berkshire Knitting Mills v. NLRB,* 139 F.2d 134. It is submitted that this case had no application to the present situation. At pages 141 and 142 of that decision the Third Circuit considered the argument that the company should not have to pay full back wages to the employees involved during all the years that the litigation had been pending. The Court pointed out that Section 10(c) of the National Labor Relations Act gave discretion to the Board in the award of back pay, "not for the actual benefit of the employee concerned, but as a matter of public concern in the effectuation of the Act. It is a public right, not a private claim, which is enforced." Here, of course, the appellees seek to enforce a private claim and there is no statutory provision similar to Section 10(e) cited in the *Berkshire Knitting Mills* case to permit a claim for damages beyond those based upon their contract of employment.

It should also be observed the appellees assert a right to punitive damages even if it is held that their appointments automatically expired at the end of 1961 (Appellees' Br. 39). However, it is well settled that no punitive damages will be allowed for a breach of contract nor even in the case of a tort "except perhaps where the complaint sets out circumstances of extreme aggravation." *Minick v. Associates Inv. Co.,* 110 F.2d 267 (D.C. Cir., 1940). Certainly, depriving the appellees of employment for a brief period during 1961 does not constitute such extreme aggravation.

CONCLUSION

Upon the basis of the foregoing points and authorities, as well as those cited in the original brief, appellants pray that this Court reverse the judgment of the District Court.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

John Victor Tilly